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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO COVARRUBIAS FLORES,

Defendant and Appellant.

H045080

(Monterey County

Super. Ct. Nos. SS972752A &

SS051201A)

Defendant Fernando Covarrubias Flores filed petitions to have two convictions dismissed pursuant to Penal Code section 1203.4.¹ On appeal, Flores contends that the trial court abused its discretion in denying both petitions. Flores also maintains that his counsel was ineffective for failing to argue that the trial court was required to grant one of the petitions and for misstating that case's procedural history. The Attorney General concedes error with respect to the trial court's denial of one of the petitions but argues that the trial court acted within its discretion in the second case. We agree that the trial court erred in denying one of Flores's petitions, but conclude that the trial court did not abuse its discretion in denying the other.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

I. FACTS AND PROCEDURAL BACKGROUND

The facts underlying Flores's convictions are not relevant to resolution of his appeal. In case SS972752A, Flores was charged by information with forcible rape (§ 261, subd. (a)(2) (count 1)) and unlawful sexual intercourse with a minor (§ 261.5, subd. (c) (count 2)). Following a court trial, Flores was acquitted of count 1 but convicted of count 2. On June 26, 1998, the trial court placed Flores on formal probation for a period of three years, ordered him to serve 90 days in jail, and imposed a number of other conditions of probation. Flores apparently successfully completed probation.²

In case SS051201A, Flores was charged by complaint with residential burglary (§ 459 (count 1)); two counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1) (counts 2, 4)); corporal injury to a spouse, cohabitant, or parent of his child (§ 273.5, subd. (a) (count 3)); misdemeanor violation of a protective order (§ 166, subd. (c)(1) (count 5)); misdemeanor cruelty to child by endangering health (§ 273a, subd. (b) (count 6)); and misdemeanor battery on a spouse, cohabitant, or former spouse (§ 243, subd. (e)(1) (count 7)). Flores pleaded no contest to counts 2, 4, and 7, and, on September 20, 2005, the trial court placed Flores on formal probation for a period of four years, ordered him to serve 300 days in jail, and imposed a number of other conditions of probation. Flores was also ordered to "obey all laws." The trial court dismissed the remaining counts pursuant to section 1385. Flores apparently violated the terms of his probation in case SS051201A in 2007, when he was convicted of a violation of section 273.6, subdivision (a).³

² The probation record for this case does not appear in the record on appeal. However, at the hearing on the 1203.4 petition, Flores's counsel stated that Flores had successfully completed probation, and neither the District Attorney at the hearing nor the Attorney General on appeal disputes that characterization. We, therefore, accept as true for the purpose of this appeal that Flores successfully completed probation in case SS972752A.

³ The record on appeal does not contain any document setting out Flores's convictions in cases other than the two that are the subject of this appeal. The District

On July 13, 2017, Flores filed a petition to dismiss case SS972752A pursuant to section 1203.4. In the petition, Flores asserted that he had fulfilled the conditions of probation for the entire period of probation. On that same day, he filed a similar petition under section 1203.4 to dismiss case SS051201A, also asserting that he had fulfilled the conditions of probation for the entire period of probation. The People objected in each case to Flores's request for dismissal.

After hearing argument from both counsel, on September 5, 2017, the trial court orally denied Flores's petitions. With respect to case SS051201A (in which Flores's counsel conceded that Flores had violated the terms of his probation), the trial court stated, "I'm going to deny based on the fact that he hasn't been close to being of good conduct. Doesn't deserve the Court in its discretion to grant it on that case. I believe it was discretionary. If anyone thinks otherwise, let me know." Turning to case SS972752A, the trial court asked the People for their position on Flores's petition. The People conceded that Flores had not committed any new offenses from his sentencing in June of 1998 until 2005 (that is, during the term of his probation) but objected to the petition "based on the seriousness of the subsequent criminal conduct." The People did not contend either that Flores had violated any of the terms of his probation in case SS972752A, or that he had failed to serve the full probationary term.

During the hearing, the trial court examined court records from case SS972752A. The trial court noted that Flores "was charged with a rape by force" and "there could be many reasons why he pled. I'm concerned he was charged with forcible rape. [He] could have been pled down, victim uncooperative. Who knows? I don't think there was a jury

Attorney orally provided the information about the 2007 conviction in the hearing on Flores's 1203.4 petition, and Flores does not argue that it is inaccurate. Therefore, we accept as true for the purpose of this appeal that Flores violated his probation in case SS051201A.

trial.” Defense counsel then (incorrectly) stated, “No, it was a plea, a negotiated plea.”⁴ Defense counsel reminded the court that Flores had successfully completed probation in the case. The trial court commented that the facts of the underlying case were “pretty disturbing.” The trial court ruled, “in my discretion I’m going to deny this one as well. So both 1203.4 dismissals are denied based on his subsequent not being of good conduct.”

Flores timely appealed the trial court’s orders denying his petitions.⁵

II. DISCUSSION

The Attorney General concedes that the trial court committed error when it denied Flores’s 1203.4 petition in case SS972752A. “Where the propriety of the trial court’s order on a petition for relief under section 1203.4 turns on the interpretation of the relevant statutory provisions, it presents an issue of law, which we review de novo.” (*People v. Seymour* (2015) 239 Cal.App.4th 1418, 1428 (*Seymour*).) We agree that the trial court erred when it denied Flores’s petition in case SS972752A.

Section 1203.4, subdivision (a)(1) allows former probationers to request that certain felony convictions be dismissed. Section 1203.4 states in relevant part: “In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set

⁴ Flores, in fact, had been acquitted of forcible rape in a court trial. Flores was not present during the hearing on his 1203.4 petition.

⁵ We have jurisdiction under section 1237, subdivision (b) over an appeal from the trial court’s denial of a 1203.4 petition filed after the probationary term has expired. (*People v. Chandler* (1988) 203 Cal.App.3d 782, 787.)

aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant” (§ 1203.4, subd. (a)(1).) If these conditions are met, a “defendant is entitled to relief ‘as a matter of right’ and dismissal is mandatory.” (*Seymour*, *supra* 239 Cal.App.4th at pp. 1429–1430, citation and internal quotation marks omitted.)

A trial court may not deny relief under this portion of section 1203.4 simply because it believes that the defendant has not been rehabilitated. “No evidence of rehabilitation is required to be entitled to relief. Likewise, evidence of crimes committed shortly after probation ends, which would seem to conclusively prove no rehabilitation had taken place, have no effect on the granting of the relief.” (*People v. Butler* (1980) 105 Cal.App.3d 585, 588 (*Butler*); *People v. Johnson* (1955) 134 Cal.App.2d 140, 144 [“[W]here a defendant has performed the requirements laid down in terms of probation the court should have no discretion but to carry out its part of the bargain with said defendant, even though it might appear at the time of application for said benefits that complete and permanent reformation or rehabilitation has not been accomplished.”].)

In case SS972752A, Flores fulfilled his probation conditions for the entire probationary period; he was apparently not at the time of his petition serving a sentence, on probation for any offense, nor charged with a crime.⁶ Furthermore, Flores was convicted of section 261.5, subdivision (c), which does not appear in the list of crimes ineligible for relief under section 1203.4.⁷ (§ 1203.4, subd. (b).) Having fulfilled all of

⁶ The record on appeal does not contain any document establishing whether Flores was on probation or charged with any crime when he filed his petitions. However, no party in the trial court argued the applicability of either of these exceptions to relief under section 1203.4. Therefore, we accept as true that Flores was neither on probation for any offense nor charged with any crime when the trial court ruled on his section 1203.4 petitions.

⁷ The statute provides, in relevant part, “Subdivision (a) of this section does not apply to any misdemeanor that is within the provisions of Section 42002.1 of the Vehicle Code, to any violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 287 or of former Section 288a, Section 288.5, subdivision (j) of Section 289,

the statutory prerequisites of the mandatory portion of section 1203.4, subdivision (a), he was entitled to dismissal of the information as a matter of right. The court had no discretion to deny the petition based on conduct that occurred after the end of the probationary term. (*Butler, supra*, 105 Cal.App.3d at p. 588.) As the trial court erred, we will order the trial court to vacate its order denying Flores’s section 1203.4 petition in case SS972752A and to enter a new order granting the petition.⁸

We reach a different conclusion with respect to the trial court’s order in case SS051201A. When a convicted defendant has not fulfilled the terms of probation for the entire period of probation or has not been discharged early from probation, the court may grant a section 1203.4 petition when “in its discretion and the interests of justice, [it] determines that a defendant should be granted the relief available under this section” (§ 1203.4, subd. (a)(1).) In these circumstances, “[a] grant of relief . . . is clearly discretionary.” (*Butler, supra*, 105 Cal.App.3d at p. 587.) In making its discretionary decision, the trial court may consider “any relevant information, including the defendant’s post-probation conduct.” (*People v. McLernon* (2009) 174 Cal.App.4th 569, 572; *People v. Guillen* (2013) 218 Cal.App.4th 975, 995.) We review the trial court’s decision for abuse of discretion. (See *Seymour, supra*, 239 Cal.App.4th at p. 1430.)

In his petition in case SS051201A, both parties agree that Flores fell within this discretionary portion of section 1203.4. However, Flores argues the trial court’s error with respect to case SS972752A “demonstrated a material misunderstanding of section

Section 311.1, 311.2, 311.3, or 311.11, or any felony conviction pursuant to subdivision (d) of Section 261.5, or to any infraction.” (§ 1203.4, subd. (b).)

⁸ In light of our decision to vacate the trial court’s order in case SS972752A, we do not reach Flores’s ineffective assistance of counsel claim, which focuses on counsel’s statements with respect to the petition in that case. To the extent that Flores claims ineffective assistance with respect to defense counsel’s statements in case SS051201A, Flores does not identify any deficient conduct with respect to defense counsel’s representation in that petition, and we discern none in the record before us. We consequently reject any claim that Flores makes with respect to ineffective assistance in case SS051201A.

1203.4 and its purposes”; a decision that rests on an error of law constitutes an abuse of discretion; and therefore we must reverse the trial court’s order in case SS051201A whether or not the trial court’s order “was otherwise reasonable.”

We disagree with Flores that the trial court did not understand the application of section 1203.4 to case SS051201A. The trial court correctly stated that its decision whether to grant relief was discretionary. The trial court also properly considered Flores’s post-probation conduct in its decision to deny relief. Unlike case SS972752A, in which Flores had fully complied with the terms of probation for the entire probationary term and was thus entitled to dismissal under section 1203.4, in case SS051201A the trial court was permitted to consider Flores’s lack of post-conviction rehabilitation in denying relief. Based upon both the number of offenses Flores had incurred after his conviction in case SS051201A and the absence of countervailing mitigating factors, we conclude that the trial court understood the parameters of its discretionary decision and did not abuse that discretion when it denied the petition in case SS051201A.

III. DISPOSITION

In case SS972752A, the order on Flores’s petition for relief under section 1203.4 is reversed. The trial court is directed to vacate its previous order denying the petition and to enter a new order granting the petition. In case SS051201A, the order on Flores’s petition for relief under section 1203.4 is affirmed.

DANNER, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

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